

REDEVELOPMENT AND BLIGHT REMOVAL IN THE COMMONWEALTH OF VIRGINIA

**Presentation Made by the
Redevelopment and Housing Authorities to the
Eminent Domain Work Group of the
Virginia Housing Commission
September 23, 2004**

Introduction

- Legislative Activity in 2004 session
- House Bill 822 and Senate Bill 301 sent to the Housing Commission
- Outline of Presentation

Outline of Presentation

- Background on Housing Authorities
- Brief review of Eminent Domain law in Virginia
- Brief review of House Bill 822
- Discussion of recent Michigan Supreme Court case
- Detailed discussion of Eminent Domain law as applied to Housing Authorities
- Discussion of problems created for Housing Authorities by House Bill 822
- Reasons for not hampering the Housing Authorities with Bill 822
- Suggestions for Alternate Approaches
- Conclusion

Background on Housing Authorities

- Where they come from
 - Created by localities under Title 36 of the Virginia Code
 - Created following a determination of need by the locality

Background on Housing Authorities

- What they are
 - Units of local government that engage in slum clearance and blight removal through the undertaking of housing projects, conservation projects and redevelopment projects
 - Exist to promote safe and sanitary housing conditions in the Commonwealth

Background on Housing Authorities

- What they are not
 - Not operated for profit
 - Not above the law – they are subject to all planning, zoning, building and other laws of the Commonwealth

Background on Housing Authorities

- KEY:
 - Housing Authorities DO NOT exist to perform industrial or economic development
 - Title 36 is focused entirely on blight removal and slum clearance, and preventing blight from reoccurring

Background on Housing Authorities

- Redevelopment Projects
 - Initiated only after a “Redevelopment Plan” is approved by the governing body
 - Must be approved by each locality affected by the project

Background on Housing Authorities

- Redevelopment Plans must show . . .
 - The project's relationship to definite local objectives
 - The land that will be made available to public and private enterprise
 - The method for relocating persons living in redevelopment areas

Background on Housing Authorities

- Redevelopment Plans
 - The locality must revisit the Plan within 30-36 months and decide whether to reaffirm it
 - Even when a Plan is reaffirmed, the Housing Authority may only acquire property until the fifth anniversary of the approval date of the Plan

Background on Housing Authorities

- Recall the “Charge” for the Housing Commission . . .
 - The Virginia Housing Commission exists to study and provide recommendations to ensure and foster the availability of safe and affordable housing for every Virginian.
 - If you recommend House Bill 822 – is that charge being met?

Brief Review of Eminent Domain Law In Virginia

- Public Use = Public Purpose
 - “[T]he General Assembly shall not pass any law . . . whereby private property shall be taken or damaged for public uses, without just compensation, the term ‘public uses’ to be defined by the General Assembly.”
- Virginia Constitution, Article I, Section 11

Brief Review of Eminent Domain Law In Virginia

- Public Use = Public Purpose
 - “The term ‘public uses’ mentioned in Article I, Section 11 of the Constitution of Virginia is hereby defined to embrace all uses which are necessary for public purposes.”
 - Virginia Code, Section 15.2-1900
 - Unchanged since its inception, over 50 years ago

Brief Review of Eminent Domain Law In Virginia

- Presumption of Public Use and Purpose in Title 36
 - “It is hereby declared that the clearance, replanning and reconstruction of the areas in which insanitary or unsafe housing conditions exist and the providing of safe and sanitary dwelling accommodations for persons of low income are public uses and purposes for which public money may be spent and private property acquired and are governmental functions of grave concern to the Commonwealth.”
 - Virginia Code Section 36-2 (1)

Brief Review of Eminent Domain Law In Virginia

- Current Interpretation of Public Use by the Courts and the Attorney General
 - “Animating public purpose” test
 - Benefits conferred upon private entities are permissible only when incidental to an “animating,” predominant public purpose

The Proposal – House Bill 822

- New Virginia Code Section 36-2 (C)
 - “For the purposes of this chapter, ‘public use’ means the possession, occupation, and enjoyment of land by the public at large, or by public agencies. To ensure the protection of the rights of private property owners, the government shall not seize land from a property owner and turn it over to another on vague grounds of public benefit to spring from the more profitable use to which the latter may devote it. The benefiting of a private entity, whether by acquisition, purchase, or leaseback shall not constitute a public use.”

The Proposal – House Bill 822

- Under this “definition” . . .
 - Housing Authorities could remove blight only if a public building is erected in its place
 - Housing Authorities would not be able to own public housing
 - Housing Authorities would not be able to engage in HOPE VI projects, or any other program designed to leverage funds

The Michigan Case

Wayne County v. Hathcock

- To understand Hathcock, look at its predecessor
- Poletown Neighborhood Council v. Detroit
 - Court allowed condemnation of an entire neighborhood to make way for a GM plant
 - Justification for ruling – economic development
 - Widely cited in the U.S. in support of broader Eminent Domain powers for local governments (but never cited in Virginia)
 - Overruled by Hathcock

The Michigan Case

- Wayne County v. Hathcock
 - County agreed with the FAA that property taken as part of an airport project would be put to “economically productive use,” and acted to condemn land for a business and technology park
 - Court overruled Poletown – economic development was found to be an inappropriate justification for the exercise of Eminent Domain

The Michigan Case is Supportive of Housing Authorities

- The “other” finding in Hathcock
 - The Court discussed instances of Eminent Domain that do constitute a permissible “public use,” including . . .
 - Where the selection of land itself is based on a public concern – this includes the acquisition of property to clear blight

The Michigan Case is Supportive of Housing Authorities

- Court in Hathcock favorably discussed another case – *In re Slum Clearance*
 - The *Slum Clearance* court found that the condemnation of blighted housing and resale to private persons was constitutional
 - “The city’s controlling purpose in condemning the properties was to remove unfit housing and thereby advance public health and safety; subsequent resale of the land cleared of blight was ‘incidental’ to this goal.” – the Hathcock court

The Michigan Case is Supportive of Housing Authorities

- The approach of the *Slum Clearance* court, cited with approval by the court in Hathcock, mirrors current Virginia law
- The Hathcock case is supportive of the position of the Housing Authorities today

The Michigan Case is Supportive of Housing Authorities

- Any private benefits provided by Housing Authorities are incidental to the overriding, “animating” public purpose of blight removal
- Key distinction – economic development versus blight removal

The Michigan Case is Supportive of Housing Authorities

- Title 36 focuses exclusively on blight removal and slum clearance
 - Any private benefits or transfers to private entities are purely in furtherance of the goals of blight removal and prevention
 - Economic development, if any, is merely a byproduct of what Housing Authorities do – it is “incidental”
 - Other entities already exist in Virginia to deal with economic development

The Michigan Case is Supportive of Housing Authorities

- Note – “Home Rule” versus “Dillon’s Rule”
 - Michigan is a “home rule” state
 - Virginia is a “Dillon’s Rule” state
 - This acts as yet another constraint on the powers of localities, including the Housing Authorities

Transition to Discussion on Eminent Domain Law – Restraints on Housing Authorities

- Constitutional – permissible public purpose
- Animating public purpose test
- Dillon's Rule
- Title 36 requirements (re: redevelopment plans, approvals)
- Condemnation laws in Title 25.1
- Limited resources of cities
- Federal Department of Housing and Urban Development

Eminent Domain Law as Applied to Housing Authorities

- All major court cases in Virginia support the use of Eminent Domain by Housing Authorities and the eventual conveyance of incidental benefits to private entities
- Focus is on the animating public purpose

Eminent Domain Law as Applied to Housing Authorities

- City of Charlottesville v. DeHaan (1984)
 - The City issued a bond, planning to give the money to the Housing Authority to loan to a developer.
 - The Court validated the bond issued by the City, because the “animating purpose” of the City’s efforts was to promote the legitimate purposes of the Housing Authority.
 - “Any benefit to the developer was incidental – not insignificant or inconsequential – but incidental. . . . [I]ncidental benefits to private entities do not make unconstitutional efforts by governmental entities to serve the needs of government.”

Eminent Domain Law as Applied to Housing Authorities

- Rudder v. Wise County Redevelopment and Housing Authority (1978)
- Rudee Inlet Authority v. Bastian (1966)
- Hunter v. Norfolk Redevelopment and Housing Authority (1953)
- Mumpower v. Housing Authority of the City of Bristol (1940)

Eminent Domain Law as Applied to Housing Authorities

- House Bill 822 is written based on two cases that have been erroneously interpreted by its proponents
- The language in the Bill has been taken out of context, and does not represent the view of the courts

Eminent Domain Law as Applied to Housing Authorities

- Phillips v. Foster (1975)
 - Case dealt with an old statute permitting an individual landowner to condemn a drainage easement on his neighbor's property – the statute was found unconstitutional
 - Case contains the same language appearing in House Bill 822, quoted from a 1927 constitutional treatise
 - In the very same paragraph, though, the Court stated that the “salient consideration” was whether “a public use is *predominant*” (emphasis added).
 - This is in accordance with the current scheme – private benefits are permissible so long as the public use is the predominant one

Eminent Domain Law as Applied to Housing Authorities

- Rudder v. Wise County Redevelopment and Housing Authority (1978)
 - Landowner challenged the disposition of land contemplated by the Housing Authority
 - Landowner relied on the ruling in Phillips, but was rebuffed by the Court
 - “[W]e were not there concerned with the power of eminent domain vested in the housing authorities. Thus, the [landowner’s] reliance on Phillips is misplaced.”

Eminent Domain Law as Applied to Housing Authorities

- Ottofaro v. City of Hampton (2003)
 - The City condemned certain land to construct new roadways and improvements to existing roadways. The plaintiffs argued a lack of public purpose, and that the underlying reason was the City's desire to convey the land to a developer for use as a shopping center.
 - Only 18% of the land was used for the road improvements.
 - The Court cited the same language used in Phillips, now used in House Bill 822.
 - BUT . . .

Eminent Domain Law as Applied to Housing Authorities

- Ottofaro v. City of Hampton
 - The condemnation was *upheld in this case*
 - In the sentence immediately following the Bill 822 language, the court stated that “the public interest must dominate any private gain,” implying that private gain is permissible so long as it is incidental
 - Ottofaro dealt with a condemnation by the City of Hampton – not by the Housing Authority

Eminent Domain Law as Applied to Housing Authorities

- So – Phillips and Ottofaro have been improperly used to draft Bill 822
 - Neither case dealt with Housing Authorities
 - Neither case repudiated the other major holdings discussed today
 - Both cases contained language permitting incidental private benefits, in accordance with other major holdings

Eminent Domain Law as Applied to Housing Authorities

- Other considerations
 - The Attorney General has consistently issued opinions in line with the cases discussed today
 - Thus, both the judicial and executive branches agree with the current framework

Eminent Domain Law as Applied to Housing Authorities

- Other considerations
 - The General Assembly has made several changes to Title 36 as recently as 2001, which will have a major impact on the activities of Housing Authorities
 - These changes will take at least five years to take full effect – let them run their course

Eminent Domain Law as Applied to Housing Authorities

- Recent Amendments
 - Localities must now revisit redevelopment plans within 30-36 months of their approval
 - Even when a plan is reaffirmed, no land may be acquired after five years from the date of approval
 - If the plan is not reaffirmed, a property owner must consent to the taking of any property within the plan that has not yet been acquired
 - Changes were also made to the rules governing condemnation by Housing Authorities, with regard to appraisals and notice procedures

Eminent Domain Law as Applied to Housing Authorities

- These amendments could have some beneficial effects on condemnation, including the reduction of instances of condemnation, further inducing Housing Authorities to engage in slum clearance only when absolutely necessary
- These recent amendments should be permitted to run their course before sweeping and harmful legislation is approved in the form of House Bill 822

Eminent Domain Law as Applied to Housing Authorities

- The law in the other 49 states is in line with Virginia
 - Blight is statutorily defined in all 50 states
 - A vast majority of states, including Virginia, have determined that blight removal is a permissible public purpose notwithstanding an eventual, incidental private benefit
 - Of the few states that hold otherwise, with only one exception of which we are aware, that determination has been made by the courts, and not by the legislature

Eminent Domain Law as Applied to Housing Authorities

- Passing House Bill 822 would make Virginia virtually the only state in the country to have legislatively prohibited these activities on the part of Housing Authorities due solely to incidental private benefits that actually further the permissible public uses and purposes behind the redevelopment or blight removal in question

Problems Created by House Bill 822

- Legal Problems
 - Problems in the Code
 - Conflict with the Constitution
 - Conflict with established case law
 - Separation of powers issues

Problems Created by House Bill 822

- Practical Issues
 - Invalidate all redevelopment plans
 - Past, current and future projects jeopardized
 - Even property not taken under Eminent Domain could be subjected to scrutiny
 - No more public housing

Problems Created by House Bill 822

- Practical Issues (cont.)
 - Ability to finance other projects jeopardized
 - Relationship between Housing Authorities and HUD jeopardized
 - Shrinking funds
 - Increased litigation

Problems Created by House Bill 822

- Remember your charge
 - Your goal is effective, long term solutions to assure safe and affordable housing
 - What are the long-term effects of endorsing House Bill 822?

The Importance of the Work Done by Housing Authorities, and Why they Rely on Eminent Domain

- Historic importance of Eminent Domain as a tool of government
- Central to slum clearance and development

The Importance of the Work Done by Housing Authorities, and Why they Rely on Eminent Domain

- The work of Housing Authorities is focused in the poorest, neediest areas
- The spread of slums and blight is highly correlated with crime rates and the perception of crime
- Eminent Domain is often beneficial to property owners

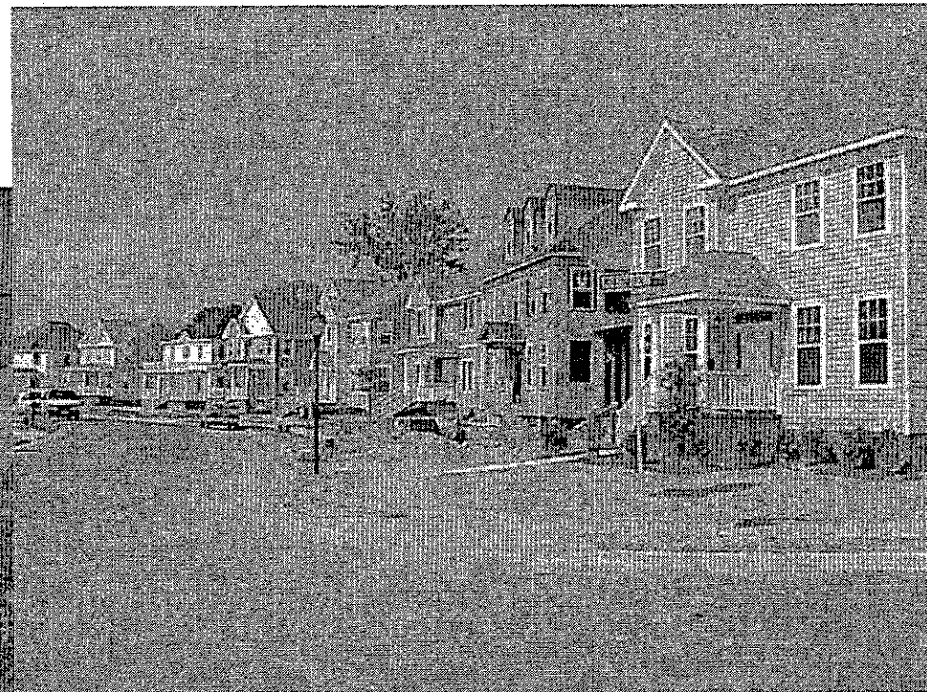
The Importance of the Work Done by Housing Authorities, and Why they Rely on Eminent Domain

- Current conditions are already adverse to the Housing Authorities, and they are already subject to multiple legal constraints
- Why make their job harder?

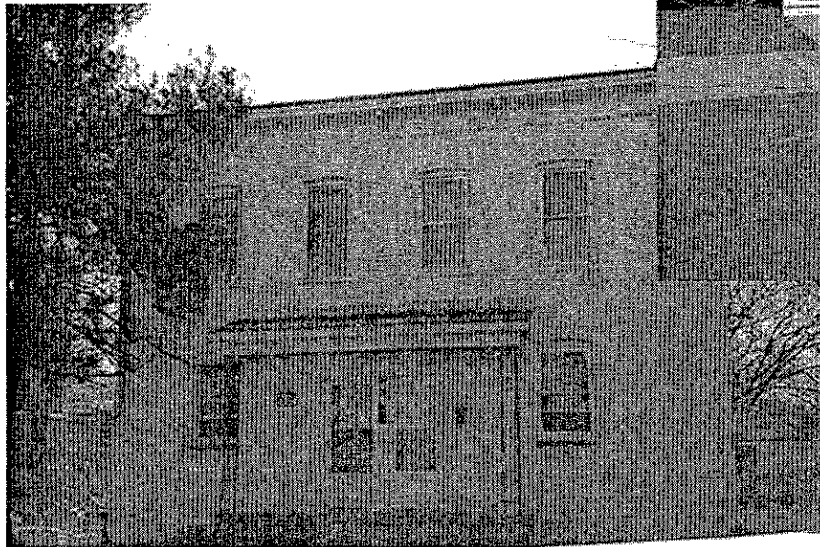
The Importance of the Work Done by Housing Authorities, and Why they Rely on Eminent Domain

- Witness some evidence of the good work that they do . . .
- (remember your charge!)

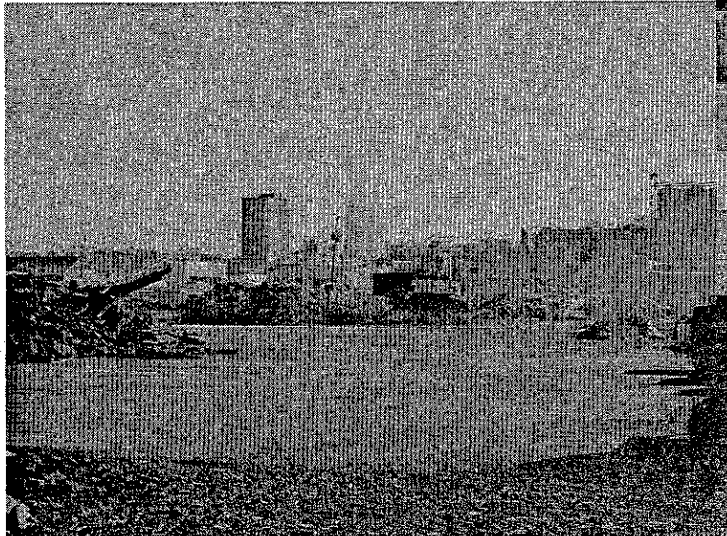
Central Brambleton Norfolk



Huntersville Norfolk



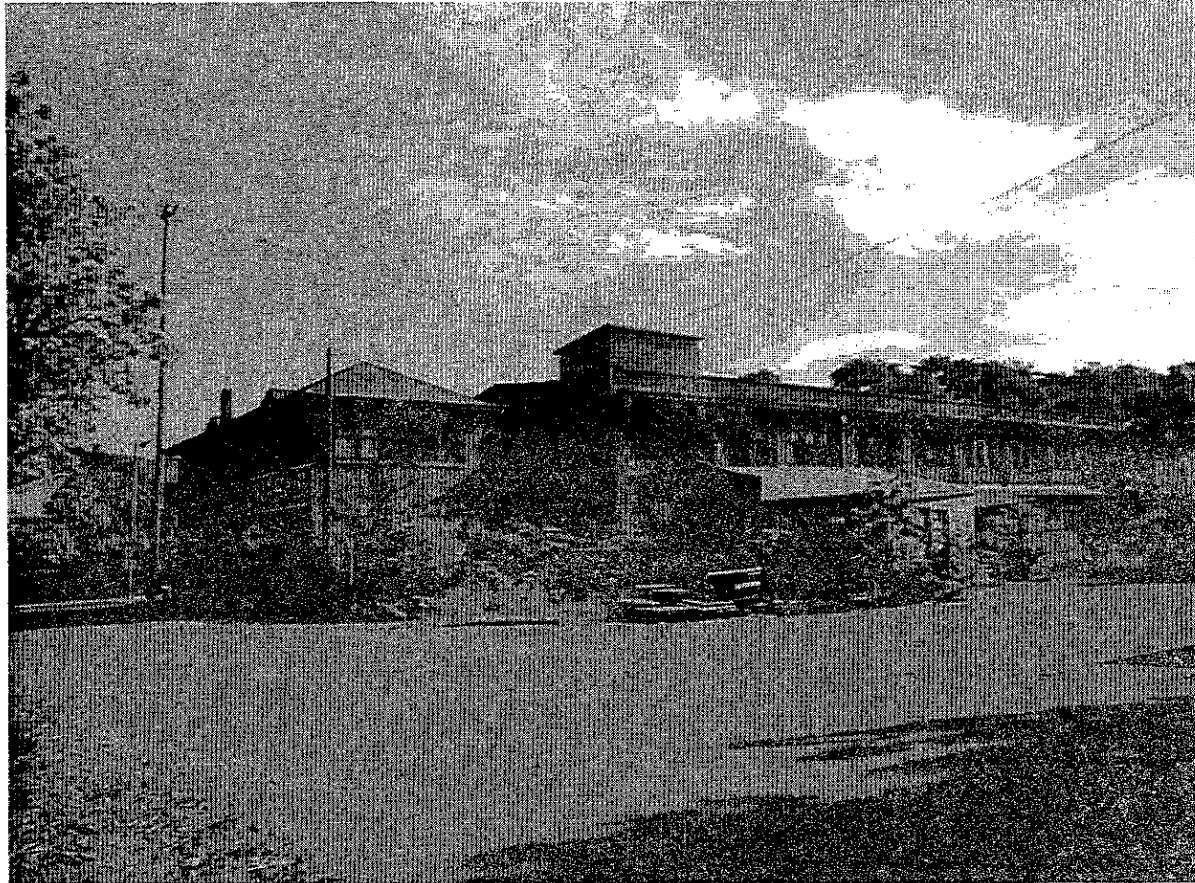
South Jefferson Roanoke



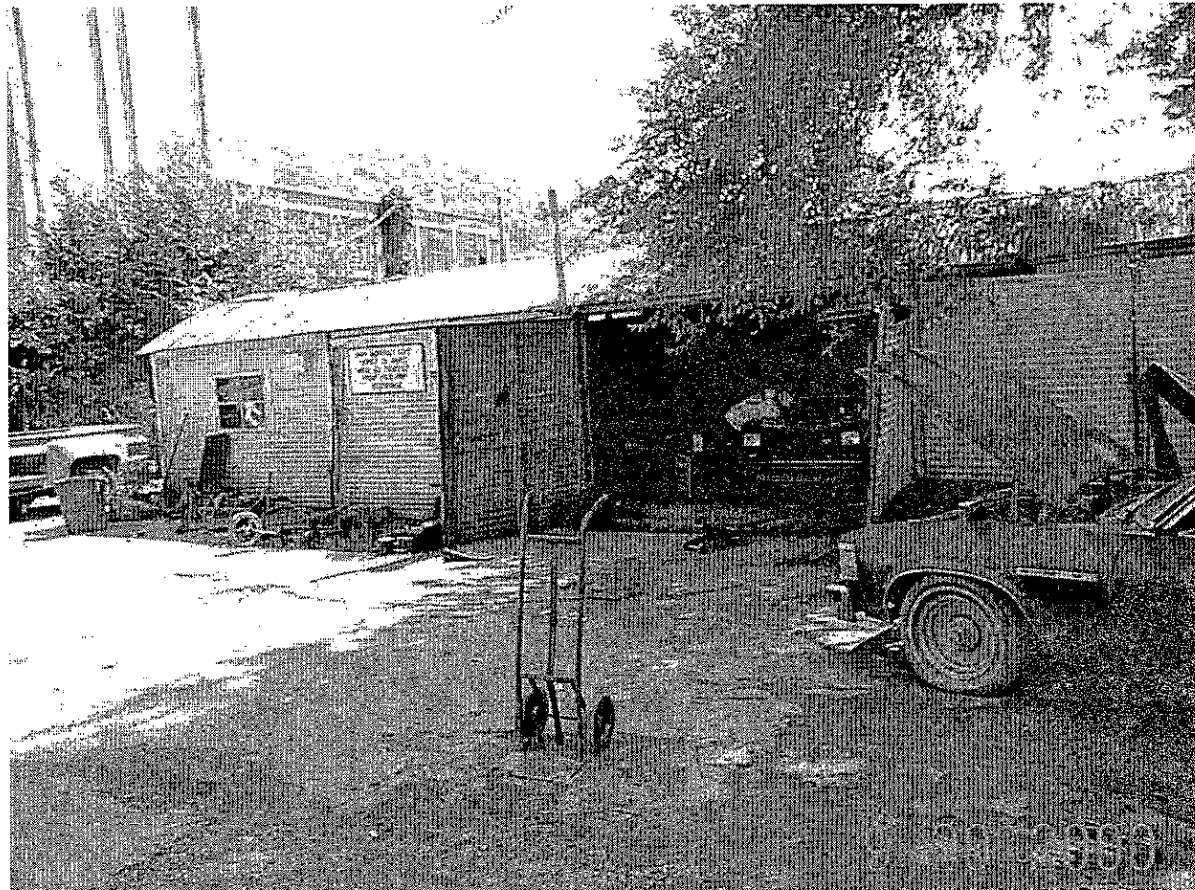
South Jefferson Roanoke – More Blight



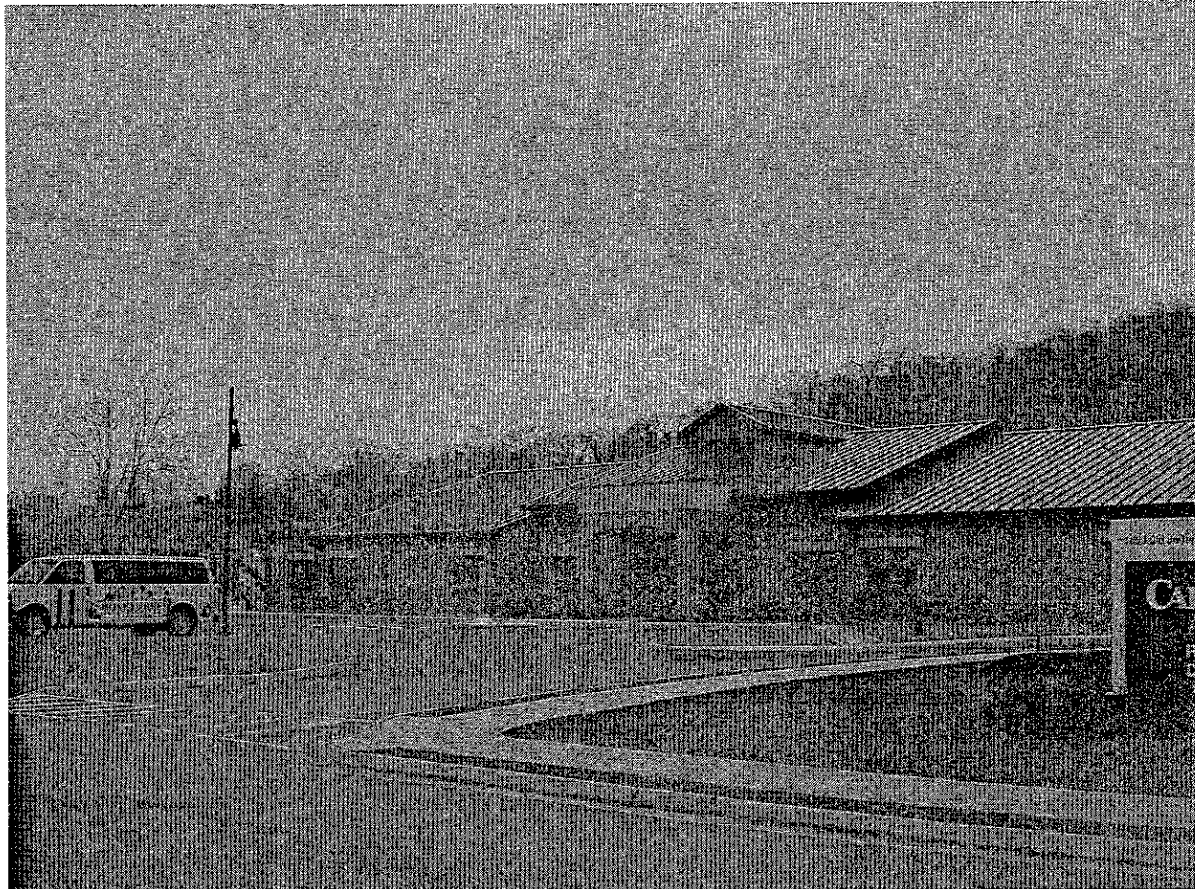
South Jefferson Roanoke – More Blight



South Jefferson Roanoke – More Blight



South Jefferson Roanoke – No More Blight

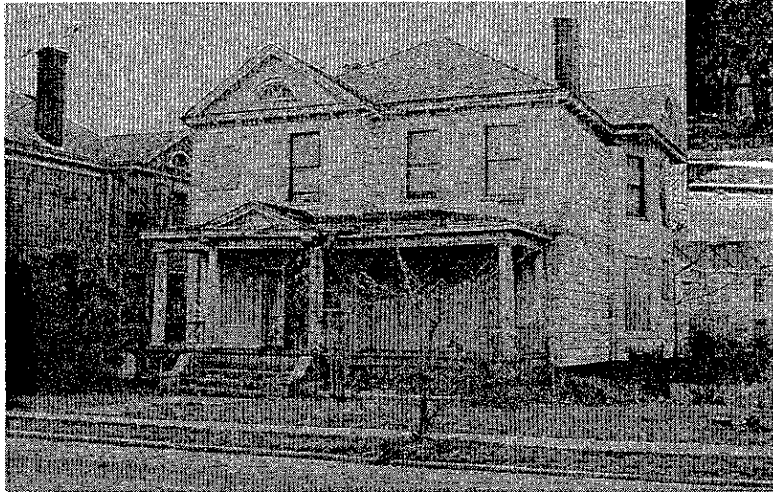


Church Hill Richmond



810-812 N. 26th Street

S. Barton Heights Richmond

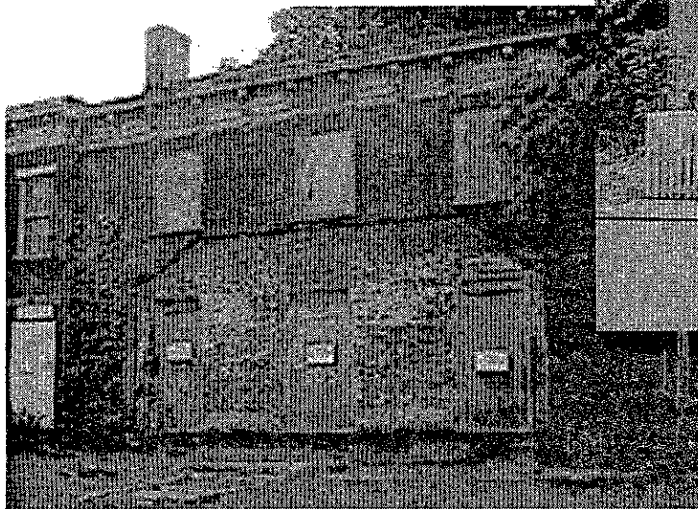


2011 North Avenue - BEFORE

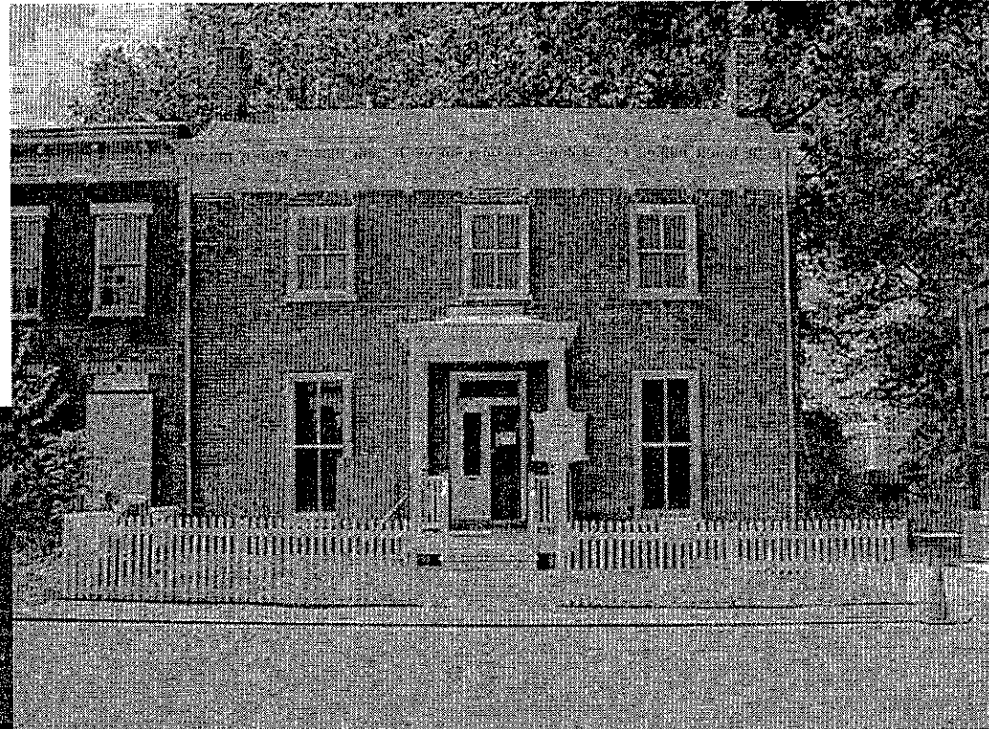


2011 North Avenue - AFTER rehabilitation

Jackson Ward Richmond



WW Browne House - BEFORE

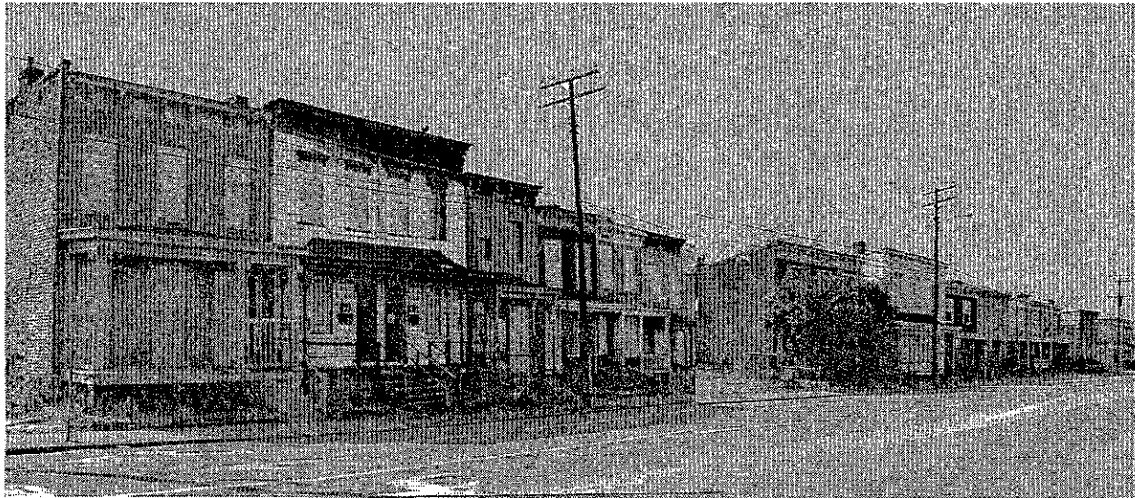


WW Browne House - AFTER

Carver Richmond

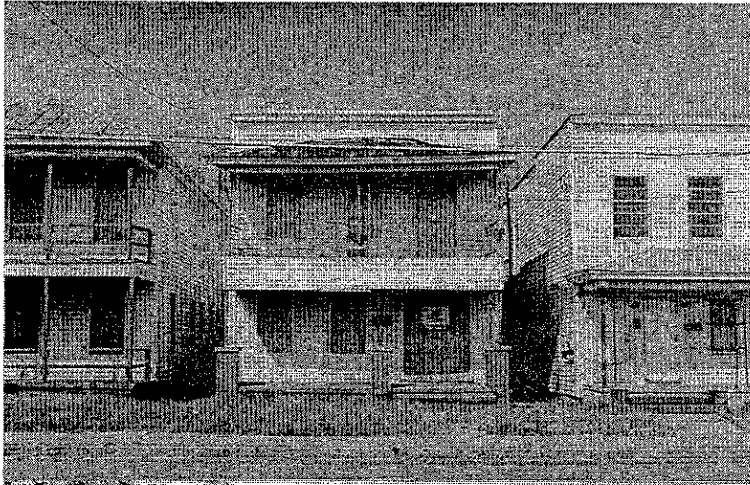


700 Block of W. Leigh Street - **AFTER** - depicting two rehabilitated houses, and five newly constructed houses. Additional houses to be constructed



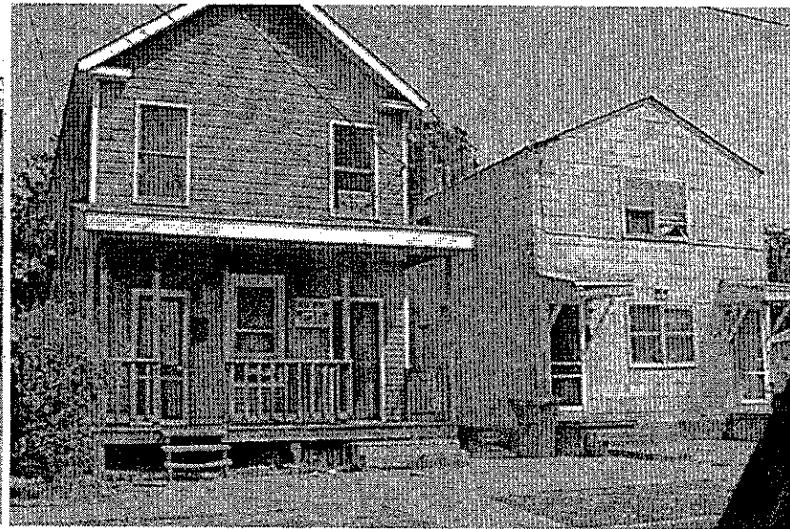
700 Block of W. Leigh Street (Carver) - **BEFORE**

Southeast Community



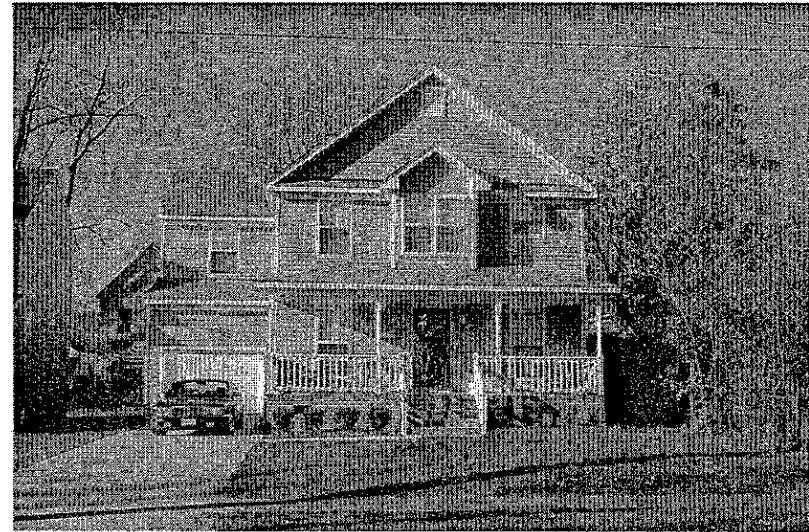
Newport News

Title 36 of the Virginia Code enabled the City of Newport News to develop a redevelopment plan to address blighted areas in the City's Southeast Community



Madison Heights

Newport News



The resulting redevelopment plan enabled the City of Newport News through its Redevelopment and Housing Authority to purchase and assemble blighted properties, demolish blighted structures, and develop attractive new homes for ownership by low, moderate, and middle income families.

The Importance of the Work Done by Housing Authorities, and Why they Rely on Eminent Domain

- Eminent Domain is an important tool
- Housing Authorities rely on Eminent Domain for crucial redevelopment and blight removal
- Hence, Housing Authorities rely on the current “public use” framework
- Reducing their abilities would render the Housing Authorities ineffective and jeopardize their ability to provide safe and affordable housing

Alternate Approaches

- Housing Authorities cannot agree to any change in the current “public use” framework – they would be put out of business

Alternate Approaches

- Wait for the recent amendments to take effect
- Revisit legislation regarding redevelopment plans
- Consider proposals to help make blight removal permanent
- Provide Housing Authorities with additional funding
- Balance the fairness scale

Summary

- The current law
 - Public Use = Public Purpose
 - Animating Public Purpose Test
 - Incidental private benefits are permissible

Summary

- The proposal – House Bill 822
 - Would redefine “public use” as applied to Housing Authorities in a manner that would render the Housing Authorities powerless to accomplish their stated goals

Summary

- The Michigan case
 - Supports the current legal framework in Virginia

Summary

- Eminent Domain law as applied to Housing Authorities
 - The law in Virginia is overwhelmingly in support of the proposition that private benefits are permissible when incidental to an animating public purpose
 - House Bill 822 was drafted based on two cases that have been misquoted
 - Housing Authorities are already subject to a long list of legal constraints

Summary

- House Bill 822 would create enormous problems for Housing Authorities
 - Legal problems, including internal conflicts within the Code and conflict with overwhelming case law, resulting in increased litigation
 - Practical problems, including the invalidating of all redevelopment plans, jeopardizing all past, current and future projects, jeopardizing all sources of funding, and rendering the Housing Authorities totally ineffective

Summary

- We should not place these burdens on the Housing Authorities
 - They provide invaluable services for our neediest citizens
 - They rely on Eminent Domain to provide these services

Summary

Remember Your Charge!



Summary

- If reigning in Eminent Domain is truly your goal, there are other ways to accomplish it without destroying the Housing Authorities
 - Recent amendments have been made – let them take effect
 - Focus on making blight removal permanent, or on enforcing long term planning and development

Summary

- The law is overwhelming in support of the current framework
- House Bill 822 is an overly broad approach to a problem based on a few individual cases
- House Bill 822 would have a devastating affect on Housing Authorities that cannot be overstated